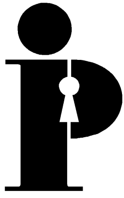
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1424

Appeal MA_000251_1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two copies of an audio taped recording of a 911 call made from his house concerning his mother, and a transcript of the call. As a result of the 911 call, an ambulance was dispatched to the appellant's home to assist his mother and she was subsequently taken to the hospital. The appellant's mother passed away while in the hospital.

The Police identified an audio tape as responsive to the request and denied access to it pursuant to section 38(b) (invasion of privacy) of the *Act*.

The appellant appealed the decision and claimed he was entitled to access the record as the executor of his mother's estate and because he held a power of attorney for his mother.

During mediation, the mediator assigned to this appeal noted that the tape recording was very short and that it appeared to be suddenly cut off. The Police explained how the 911 process operates, indicating that once 911 determines that an ambulance is required, the call is transferred to the ambulance discharge. In essence, the 911 operator acts only as a referral agent to the ambulance service. The Police indicated further that as soon as the connection to the ambulance is made, the 911 operator immediately terminates his or her portion of the call. This information was communicated to the appellant. However, he still wishes to pursue access to the tape.

For reasons which the appellant does not wish to reveal publicly, he requested that the mediator place his appeal on hold in order to preserve the audio tape beyond the Police's standard retention period (as set out in their Record Retention Schedule, By-law No. 378/98) .

The mediator advised the appellant that his request did not fall within the IPC's policy for placing appeals on hold. The appellant indicated that he wished to pursue this issue in adjudication.

Further mediation could not be effected and the appeal was moved into inquiry. Based on the appellant's letter of appeal and subsequent discussions with the Mediator, the issues to be decided in this inquiry are:

- should the appeal be placed on hold?

- is the appellant entitled to exercise the rights of his mother (the deceased) pursuant to section 54(a) of the *Act*?

- is the appellant able to exercise the rights of his mother under a continuing power of attorney, a power of attorney for personal care as guardian of the person and/or property pursuant to section 54(b) of the *Act*?

- is the record exempt under section 14(1)(f) or section 38(b) of the *Act*?

I sought representations from the appellant, initially. He submitted representations in response. Based on my review of them, I decided that it was not necessary to seek representations from the Police.

In his representations, the appellant states:

> I request that absolutely no information I have provided to the IPC during Mediation and Adjudication be shared with the other party.

The appellant goes on to explain his reasons for requesting confidentiality. Based on these submissions, it is apparent that the appellant's concerns about sharing large portions of his representations extend far beyond the Police. In essence, the appellant does not wish these portions of his representations to be made public in any way.

Because of my findings below, I have decided to accede to his request. As a result, I will be unable to explain the basis for my decision in as much detail as I normally would.

RECORD:

The record is an audio tape of a 911 call made by the nurse attending the appellant's mother at his home. A transcript of this call does not exist.

DISCUSSION:

SHOULD THE APPEAL BE PLACED "ON HOLD"

In some limited cases, the Office of the Information and Privacy Commissioner/Ontario (the IPC) may place an appeal "on hold", or in other words, grant a postponement for the final resolution of the issues in it. This might occur, for example, where the parties to the appeal are awaiting some event which may make proceeding with the file unnecessary, such as where an appellant is involved in litigation and has requested the record at issue from the institution or an affected party as part of the discovery process.

The limited availability of postponements is consistent with the principle that administrative tribunals should operate efficiently and expeditiously and in accordance with the principles of natural justice.

The appellant was asked to explain in detail why he believes this is an appropriate case to put the appeal on hold.

He indicates in his representations that his situation is similar to the example that I noted above. He is further concerned that because of the retention schedule used by the Police, once the appeal is concluded, the record may be destroyed prior to his intended use of it.

There is always a risk that a particular record being sought might have already been destroyed by the time of the request in accordance with an institution's retention schedule. The *Act* requires

that personal information be maintained for a specified period of time as set out in Regulation 823 (section 5). In particular, sections 30(1) and (4) of the *Act* provide:

> (1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.
>
> ...
>
> (4) A head shall dispose of personal information under the control of the institution in accordance with the regulations.

Section 5 of Regulation 823 provides:

> Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution unless the individual to whom the information relates consents to its earlier disposal.

Assistant Commissioner Tom Mitchinson had occasion to consider the record retention schedule of a different police force as it relates to 911 tapes in Interim Order M-1121 and Final Order M-1135. In Final Order M-1135, he made the following comments on the retention of 911 tapes in the circumstances of that appeal, in on the more general issue of the retention of records that are the subject of an access request under the *Act*:

> In Interim Order M-1121, I also expressed concern regarding the fact that the original 911 tapes had been destroyed, despite the fact that an appeal involving these tapes was in progress. My order included the following comments:
>
>> By reviewing the original tapes in the course of responding to the appellant's request, the Police "used" the personal information contained in them within the meaning of section 5 of Regulation 823. I have reviewed the record retention by-law provided to me by the Police, and it does not reduce the minimum time period established by section 5. Therefore, in my view, the Police were obliged to maintain the original tapes for a period of one year following this use.
>>
>> I would go further than this. While there are no specific provisions in the *Act* covering the retention of records which do not contain personal information or records which are the subject of an ongoing access request, in my view, institutions have an inherent responsibility to retain original records containing information which is the subject of a request under the *Act*, regardless of the operation of any records retention schedule which may provide for their destruction. Clearly, in order to give effect to the access provisions in the *Act*, when an institution receives a request, that

> triggers an obligation on the institution to ensure that the original responsive records are retained and not destroyed until the request has been satisfied and any subsequent proceedings before the Commissioner or the courts is completed.

The Co-ordinator included the following statement in his representations:

> In reference to the destruction of the original twenty four (24) hour reel to reel Dictaphone recording tapes. As the Freedom of Information Branch coordinator I did make Cassette Tape #1 from the original tapes. The tapes were not held but returned to the system. In order to be in Compliance in the future a revision will be made in future Woodstock City Police Department policies and procedures which will reflect that when a Freedom of Information request is made in relation to audio records of the Woodstock City Police Department, that the audio records be maintained for one year in accordance with Section 5 of Regulations 823 of the Freedom of Information Act.

This commitment is welcomed. However, it does not completely address my comments in Interim Order M-1121. In amending its polices and procedures, I would encourage the Police to also address the situation where records are subject to an ongoing access request **but do not contain personal information**. As previously stated, in my view, institutions have an inherent responsibility to retain original records which are the subject of a request under the *Act*, regardless of any records retention schedule, and regardless of whether or not they contain personal information. [emphasis in the original]

In this case, the appellant is concerned that the "last use" of the record will be upon final determination of this appeal by the Commissioner's office and that the Police will destroy it shortly thereafter.

I have determined (below) that the 911 tape contains personal information. Accordingly, the *Act* and Regulation require that the Police preserve it at least as long as the shorter of one year or a period specified by their by-law.

In my view, the appellant's situation is not sufficiently similar to the example I provided to bring him within the IPC policy for placing an appeal on hold. I accept that the appellant has initiated a matter in which he believes the tape will form essential evidence". I am uncertain as to when this occurred, although based on his submis"sions, I assume that it began sometime around the end of June 2000. The appellant admits that the matter has not proceeded because of his own inaction in pursuing it. Based on the appellant's submissions, I am not persuaded that the matter is imminent, or that there is a reasonable expectation it will proceed at all.

In any event, section 51(1) of the *Act* provides that this *Act* does not impose any limitation on the information otherwise available by law to a party to litigation. If the appellant wishes to

preserve this tape, he is not precluded from pursuing whatever avenue is available to him through the process he has initiated.

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act* as "... recorded information about an identifiable individual". In addition, section 2(2) of the *Act* provides that "personal information does not include information about an individual who has been dead for more than thirty years."

The record contains an audio recording of the call made by the nurse through the 911 system relating to the condition of the deceased. In the circumstances of this appeal, I find that the record contains the personal information of the nurse in that it contains her observations and actions in relation to the deceased.

The appellant indicates that his mother passed away on October 17, 1997. As she has been dead for less than 30 years, the information about her in the record also qualifies as her personal information as it pertains to her medical state.

The information in the record about the nurse and the deceased is intertwined such that it is not severable.

The record does not contain the appellant's personal information.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE/UNDER A POWER OF ATTORNEY

Introduction

As I indicated above, the appellant believes that he is entitled to obtain the record in his capacity as executor of his mother's estate and because he held a power of attorney for her. Sections 54(a) and (b) of the *Act* provide that:

> Any right or power conferred on an individual by this Act may be exercised,
>
> (a) if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;
>
> (b) by the individual's attorney under a continuing power of attorney, the individual's attorney under a power of attorney for personal care, the individual's guardian of the person, or the individual's guardian of property.

I will first consider whether the appellant is entitled to exercise the access rights of his deceased mother pursuant to section 54(a) the *Act*.

Personal Representative

The term "personal representative" used in section 54(a) is not defined in the *Act*. However, section 54(a) relates to the administration of an individual's estate and the meaning of the term must be derived from this context.

Decisions of this office and the courts have confirmed the limited nature of a personal representative to obtain information relating to the deceased (see Orders M-919, M-1048 and *Adams v. Ontario (Information and Privacy Commission*, *Inquiry Officer*) (1996), 136 D.L.R. (4th) 12 (Ont. Div. Ct.)).

In Order M-919, former Adjudicator Anita Fineberg reviewed the law with respect to section 54(a) and came to the following conclusions:

> The meaning of the term "personal representative" as it appears in section 66(a) of the *Freedom of Information and Protection of Privacy Act*, the equivalent of section 54(a) of the *Act*, was considered by the Divisional Court in a judicial review of Order P-1027 of this office. In *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-19, the court stated:
>
>> Although there is no definition of "personal representative" in the Act, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:
>>
>> 1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.
>> ...
>
> ... I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

I agree with this analysis. The appellant has provided a copy of the Certificate of Appointment of Estate Trustee With a Will which appoints him as the "Estate Trustee With a Will" for his mother's estate. In my view, this appointment is comparable at law to the positions listed under the definition of "personal representative" in the statutes referred to by the Court in *Adams*, and I find that the appellant has established that he is the "personal representative" of his mother's estate, for the purposes of section 54(a). (See also Order MO-1196).

Relates to the Administration of the Individual's Estate

In Order M-1075, Assistant Commissioner Tom Mitchinson made the following statements about the second requirement of section 54(a):

> The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the *Act*, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.
>
> In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

In his representations, the appellant states:

> My mother lived in my house. She had complete trust and confidence in me. Whenever necessary, I would discuss my mother's health and health care with the medical doctors and nurses involved in her health care.
>
> Since my mother's passing, I as Executor have requested and received from various sources my mother's personal and medical records. After thorough review, I have made decisions which were done in my duty in the Administration of my mother's Estate.

The appellant believes that he should be granted access to the tape because of his "legal status" as executor and estate trustee.

The appellant also refers to a number of possible legal matters he may be involved in as executor and estate trustee relating (in various ways) to the death of his mother and states:

> As Estate Trustee and Executor, I will need to make the decisions to take these actions and authorize the expenditure of the funds for the legal fees.
>
> These decisions and the resulting expenditures are part of my Administration of the Estate.

The appellant alludes to achieving "positive results" for the "estate's interests", but does not expand on what these results might be or the legal basis for initiating them within the meaning of "administration of the estate" as applied by this office.

Previous orders of this office have considered a number of different situations where a personal representative has sought records for the purpose of pursuing some kind of action connected to the death of an individual (see, for example, Orders M-400, MO-1256, MO-1260, MO-1271 and *Adams* (referred to above)). In Order MO-1256, Assistant Commissioner Mitchinson found:

> The records in this case relate exclusively to the police investigation into the circumstances surrounding the death of the appellant's husband. None of the records contain information relating to the deceased's finances or financial transactions. In addition, the appellant does not require access to the records in order to defend a claim being made against the estate (Order M-919) or to exert a right to financial entitlements being denied to the estate (Order M-943). Although I accept the appellant's position that she is seeking access to the records in order to determine whether there is any cause for a civil action, I am not satisfied that this purpose relates to the administration of the estate of the deceased in the sense contemplated by section 54(a). Any damages recovered by family members as a result of a derivative action such as the one being considered by the appellant in the present appeal, go to individual family members, not to the estate (*Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L. R. (4th) 12 (Div. Ct.)).

I agree with this approach in determining whether the records relate to the administration of the deceased's estate. The record relates exclusively to the information provided by a nurse to the 911 operator. There is nothing in the record that remotely relates to financial matters or any other matters that would normally be associated with the appellant's right or power to "wind up" the deceased's estate. Similar to the circumstances in Order MO-1256, the record is not required to defend a claim against the estate, nor is it required in order to exert a right to financial entitlements being denied to the estate.

Based on the representations and my independent review of the record, I am unable to conclude that this record relates to the administration of the deceased's estate, as required by section 54(a).

Power of Attorney

Section 54(b) only has potential application when the individual in question is alive, which is clearly not the case in the present circumstances (Order PO-1715). Once his mother died, any power of attorney that the appellant held would cease to be in effect. Accordingly, I find that section 54(b) has no application in the circumstances of this appeal.

INVASION OF PRIVACY

Where the record only contains the personal information of other individuals, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption.
The appellant's representations focus on the fact that he is the executor of his mother's estate and in that capacity he has a right to obtain the record. He also believes that access to the tape will assist him in making decisions about the administration of her estate and in pursuing the matter referred to above as well as any other matter he might decide to bring in the future. In this regard, the appellant appears to be raising section 14(2)(d) as a factor weighing in favour of disclosure. This section provides:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request;

In order for section 14(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

(See Orders PO-1815, P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)] and PO-1764)

As I indicated above, I accept that the appellant has initiated a legal matter which relates to the existence of this record. I also accept that this record may have some bearing on any determination that might be made in this regard. On this basis, I find that section 14(2)(d) is relevant. I am not similarly inclined to find that this section is relevant with respect to any future "matters" that the appellant may wish to pursue, as the appellant has failed to provide sufficient evidence to establish that any future actions are reasonably contemplated or foreseeable.

The appellant admits that the legal matter has not proceeded because of his own inaction in pursuing it. Based on the appellant's submissions, I concluded above that there is significant doubt as to whether it will proceed at all. In these circumstances, I am only prepared to give this factor moderate weight.

Based on the appellant's confidential submissions, I find that the factor weighing in favour of non-disclosure in section 14(2)(f) is also relevant. This section states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > the personal information is highly sensitive.

As I noted above, the record contains the personal information of the deceased as well as that of the nurse attending her. In the circumstances of this appeal, I find that the personal information in this record as it pertains to the nurse is highly sensitive, and this factor weighs heavily in favour of non-disclosure.

After considering the appellant's submissions in their entirety, I am not persuaded that there are any other relevant factors which favour disclosure of the record.

In balancing the factor favouring disclosure in section 14(2)(d) against the factor weighing in favour of privacy protection in section 14(2)(f), I find that, in the context of the appellant's overall agenda surrounding the death of his mother, the factor favouring privacy protection outweighs the other.

Further, section 14(1)(f) permits disclosure only if it does *not* constitute an unjustified invasion of privacy. Therefore, even if I were to find that the "fair determination of rights" factor and the "highly sensitive" factor are of equal weight in the circumstances, I cannot conclude that disclosure does *not* constitute an unjustified invasion of privacy (see, for example: Orders PO-1699 and PO-1735).

Accordingly, in either case, I must conclude that the section 14(1)(f) exception does not apply. In the circumstances of this appeal, I find that neither section 14(4) nor 16 applies. As a result, I find that the record is exempt pursuant to section 14(1) of the *Act*.

ORDER:

I uphold the decision of the Police.

Original signed by: April 25, 2001
Laurel Cropley
Adjudicator